No 498

SEP 25 1944
CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

EMIL J. SONDERLICK,
Plaintiff-Petitioner,

against

THOMAS H. SIMMONS, *et al.*,
Defendants,

THOMAS J. HALLINAN,
Defendant-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST DEPARTMENT, AND BRIEF IN SUPPORT THEREOF.

EMIL J. SONDERLICK,
Petitioner.

by JACOB W. FRIEDMAN,
Attorney for Petitioner.

MARK SERVICE, BARCLAY 7-2180

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST DEPARTMENT.

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner Emil J. Sonderlick respectfully prays for a writ of certiorari to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department (the highest court in the State of New York in which a determination could be had herein), to review a judgment of that Court entered on February 18th, 1944, affirming a summary judgment in favor of defendant Hallinan dismissing the complaint on the merits.

On March 24th, 1944, the said Appellate Division denied petitioner permission to appeal to the Court of Appeals

of the State of New York, and the Court of Appeals likewise denied such permission on May 25th, 1944, so that a determination could not be obtained in any state court higher than said Appellate Division. On August 25th, 1944, Mr. Justice Jackson signed an order extending to and including September 25th, 1944, the time of petitioner within which to file his petition for certiorari.

Statement of Matters Involved.

In his complaint, the plaintiff-petitioner sets forth seven causes of action, the first of which is an action for malicious prosecution, the second, third and fourth of which are each an action for malicious abuse of process, the fifth, an action in ejectment, the sixth, an action for trespass, and the seventh, an action for conversion (55-90). The defendant-respondent Hallinan is affected by the third, fifth, sixth and seventh causes of action (68-73, 78-86).

On September 8, 1939, petitioner purchased the real property, which included an apartment house of eight four-room apartments and a two-car brick garage, located at 8716 Britton Avenue in the Borough of Queens, City and State of New York (217) and duly recorded the deed in the office of the Register of Queens County on September 9, 1939 (217-218).

On January 16, 1941, petitioner was wrongfully ousted from possession of his said real property by respondent Hallinan, who seized possession of the said real property under the guise of an illegal and void receivership (218). The order purporting to appoint Hallinan receiver of petitioner's real property (142-156) was obtained in an action entitled *"Juanita Gelly, Plaintiff, against Anna Kalamon, Joseph Kalamon and Theodore A. Dylewski, Defendants"* in the Supreme Court, Queens County (218-219).

Petitioner was never a party in the *Gelly* v. *Kalamon* action. His real property was not involved in the action. Nor was notice of the appointment of the so-called receiver ever given to him as owner of the said real property (219).

Moreover, the purported receivership was contrary to the order of October 2, 1939 (268-273), of the Supreme Court, Queens County, vacating a *lis pendens* filed against the real property in the *Gelly* v. *Kalamon* action (219-220).

The purported receivership was in complete violation of section 121 of the New York Civil Practice Act (220-221), which declares:

> "* * * After a notice of pendency of action has been cancelled, neither the proceedings in the action nor any judgment which may be rendered therein shall affect the real property described in any such cancelled notice."

The purported receivership was founded on an order (142-156) claiming to appoint Hallinan a receiver in the *Gelly* v. *Kalamon* action "pending compliance by the defendants Anna Kalamon and Joseph Kalamon and/or their attorney Emil J. Sonderlick, with the terms of the resettled judgment herein." But the resettled judgment in the *Gelly* v. *Kalamon* action makes no mention of petitioner (274-291). Nor is it binding on petitioner or his said real property (223).

After several requests for summary relief from the illegal confiscation of his property were denied, petitioner was obliged to challenge the validity of the so-called receivership by instituting this plenary action against Hallinan.

In his amended answer (92-93), Hallinan interposed a general denial upon information and belief and thus put

in issue each and every allegation in the complaint, including allegations in the first, second and fourth causes of action wherein he is not named as a defendant.

For his first defense (93-108), Hallinan alleged that the order purporting to appoint him a receiver was and is "a subsisting order of the Supreme Court of the State of New York" (96), that he was acting as "agent" for the Supreme Court, Queens County, that his accounts were duly settled and approved and that he was duly discharged as "receiver" in the *Gelly* v. *Kalamon* action (107-108).

Petitioner's reply (136-141) to the first defense in Hallinan's amended answer put in issue the validity of the order purporting to appoint Hallinan a receiver of petitioner's real property (230).

In the affidavit submitted in opposition to Hallinan's motion for summary judgment, petitioner stated that the foreclosure action commenced by the holder of the first mortgage on the said real property was brought on by Hallinan's deliberate default in the payment of some mortgage interest and real property taxes on the said property (232), and that Hallinan instigated the foreclosure action in an attempt to extricate himself from the illegal and void receivership under the cloak of a judicial extension of the *Gelly* v. *Kalamon* receivership to the foreclosure action (233). These accusations were not denied by Hallinan.

Petitioner's affidavit also attacked the validity of the resettled judgment in the *Gelly* v. *Kalamon* action on the ground that it was founded on a complaint (292-315) which is insufficient in law on its face because it does not comply with section 442-d of the New York Real Property Law (233-235). Nor did Hallinan refute this attack upon the validity of the resettled judgment in the *Gelly* v. *Kalamon* action.

For his second defense (108-134), Hallinan alleged that in an action entitled "*Joseph Kalamon, Plaintiff, against Anna Kalamon and Emil J. Sonderlick, Defendants*" in the Supreme Court, Queens County, an "Interlocutory Judgment" (196-202), dated and entered on February 7, 1941, nullified the deed under and through which petitioner claims title to the said real property (128) and that by a "Final Judgment" (203-213), dated July 7, 1941, and entered on July 11, 1941, the matters and issues in litigation in this action were finally adjudicated, adversely to petitioner, and settled, and that petitioner is thereby barred from prosecuting this action (43).

In his affidavit, petitioner showed that the facts and law did not substantiate the claims and allegations put forth by Hallinan (237-265).

Thus, even if the validity of the "Interlocutory Judgment" and the "Final Judgment" in the *Kalamon* v. *Kalamon* action was not otherwise subject to question or attack, petitioner is concededly the owner of an undivided one-half interest in the said real property (241-247). The "Interlocutory Judgment" provided that (200):

> "* * * any transfer of plaintiff's (Joseph Kalamon's) rights thereby be and the same are (sic) restored to the plaintiff, * * *."

Inasmuch as petitioner's grantor, Anna Kalamon, owned a one-half interest in the said real property from 1933, and she never repudiated the conveyance of her interest to petitioner, a judgment in a suit by Joseph Kalamon could not and did not divest petitioner of the one-half interest he had derived from Mrs. Kalamon (243). An appreciation of this fact—namely, petitioner's continuous ownership of at least a one-half interest in the said real property at all pertinent times—is fundamental to an understanding of the issues on this appeal.

From September 9, 1939, to February 5, 1941, the date of the "Interlocutory Judgment", petitioner was the sole record and beneficial owner of the said real property (242-243). Hallinan, as "receiver", originally entered and trespassed on petitioner's property on January 16, 1941 (243).

Moreover, the validity of the "Interlocutory Judgment" and the "Final Judgment" in the *Kalamon* v. *Kalamon* action was attacked on the ground that they were founded on an amended complaint (181-195) that is insufficient in law on its face (247-248) and are violative of the Constitutions of the United States of America and of the State of New York in relation to the taking of property without due process of law (248-249).

In addition, petitioner averred that Joseph Kalamon had repeatedly stated to him, long after the entry of the so-called judgments in the *Kalamon* v. *Kalamon* action, that he (Kalamon) had no claim against petitioner, that petitioner owed him no money, that he recognized petitioner's title in the said real property, and that he was not even aware that his attorney had impleaded petitioner in the *Kalamon* v. *Kalamon* action (264-265).

Question Presented.

Was the summary dismissal without a trial of petitioner's ejectment action and his other claims, which dismissal was predicated upon affidavits setting forth an alleged prior adjudication in an action to which he was not a party and wherein he was deprived of his property through a void receivership granted without notice to him as owner of the property, due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States?

Reasons for Allowance of Writ.

1. Petitioner, through the decision of the Court below, has been deprived of valuable real property, his title thereto has been ignored and he has been denied the opportunity of ousting those wrongfully in possession.

2. His title to this property has been nullified on the basis of an alleged prior adjudication in an action to which he was not a party, and in disregard of the plain provisions of New York Civil Practice Act, Sec. 121.

3. He has been ousted of his possession through the medium of a void receivership granted without notice to him as owner.

4. He has been deprived of a trial on the merits.

5. All of the foregoing proceedings are grossly violative of his rights under the Fourteenth Amendment, as he has urged from the outset.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the Appellate Division of the Supreme Court of the State of New York, First Department, commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings of said Appellate Division had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the said Appellate Division be reversed, and that petitioner be granted such other, further and different relief as may seem proper.

Dated, New York, N. Y., September 22, 1944.

EMIL J. SONDERLICK, *Petitioner,*

by JACOB W. FRIEDMAN,
Counsel for Petitioner.

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EMIL J. SONDERLICK,
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against

THOMAS H. SIMMONS, *et al.*,
Defendants,

THOMAS J. HALLINAN,
Defendant-Respondent.

—o-o—

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

No opinion was rendered by any of the courts below.

Jurisdiction.

The judgment of the Appellate Division of the Supreme Court of the State of New York, First Department, now sought to be reviewed, was entered on February 18th, 1944. On March 24th, 1944, the same Court denied petitioner's motion for permission to appeal to the Court of Appeals of the State of New York. The Court of Appeals denied like permission on May 25th, 1944. On August 25th, 1944, Mr. Justice Jackson, of the Supreme Court of the United States, signed an order extending petitioner's time to apply for certiorari to and including September 25th, 1944.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended, 28 U. S. C., Section 344 (b).

Petitioner seasonably and at the outset raised the constitutional question (fols. 223-224, 248-249), urging that the determinations involved were depriving him of property without due process of law, in contravention of the provisions of the Constitution of the United States.

Statement of the Case.

A summary statement of the case is set forth in the petition.

Specification of Errors to be Urged.

It is intended by petitioner to urge as errors, unless limited by this Court, all of the matters set forth in the petition as reasons for the allowance of the writ.

Argument.

1. *The order purporting to appoint Hallinan receiver of petitioner's property was null and void.*

As the Supreme Court, Queens County, had no jurisdiction of either petitioner or of his said real property, the order purporting to appoint Hallinan receiver was altogether a nullity. Clark on Receivers, page 414; High on Receivers, 4th edition, page 57.

The order is also void because no notice of the appointment was given to petitioner as the owner of the said property. 53 Corpus Juris 59; *Brooklyn Empire Construction Co.* v. *Cinak Realty Corp.*, 226 App. Div. 809.

The order was contrary to the law of the case inasmuch as the Court had vacated the *lis pendens* on October 2, 1939. The order was also violative of section 121 of the New York Civil Practice Act.

2. *The validity of the receivership being challenged by a plenary action of ejectment, petitioner is entitled to a trial of his accrued causes of action against Hallinan.*

As the Supreme Court, Queens County, was without jurisdiction to make the appointment, the order of appointment may be attacked at any time, in all forms and by all persons. Alderson on Receivers, 2nd edition, page 178; Clark on Receivers, *supra*; High on Receivers, *supra.*

It is proper to sue Hallinan individually for his wrongful entry and possession of petitioner's real property. Wait's New York Practice, 4th edition, volume 11, page 741; High on Receivers, 4th edition, page 55; *Fallon* v. *Egberts Woolen Mills Co.*, 56 App. Div. 585, 67 N. Y. Supp. 347, 348.

3. *Summary judgment was improper as there are issues to be tried before a jury.*

Dwan v. *Massarene*, 199 App. Div. 872.

4. *The dismissal of petitioner's ejectment action without a trial and on the basis of an alleged adjudication in an action to which he was neither party nor privy was a deprivation of property without due process of law, in violation of the Constitution of the United States, Amendment XIV.*

The validity of petitioner's contention in this regard is unassailable. The case is governed by the controlling decision of this Court in *Postal Telegraph-Cable Co.* v. *Newport*, 247 U. S. 464, 62 L. Ed. 1215, where Mr. Justice Pitney wrote, for the unanimous Court (citing many authorities):

> "The doctrine of *res judicata* rests at bottom upon the ground that the party to be affected, or some

other with whom he is in privity, has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction * * *. The opportunity to be heard is an essential requisite of due process of law in judicial proceedings * * *. And as a state may not, consistently with the 14th Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard * * *, so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein."

The application of these principles compels the conclusion that petitioner was deprived of his constitutional rights.

Conclusion.

For the reasons stated in the petition and in this brief it is respectfully submitted that the application for the writ of certiorari should be granted.

Respectfully submitted,

EMIL J. SONDERLICK,
Petitioner,

By JACOB W. FRIEDMAN,
Attorney for Petitioner.

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CHARLES ELMORE CROPLEY

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Defendants,

THOMAS J. HALLINAN,
Defendant-Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The Facts.

Petitioner brought this action to recover of the defendants damages predicated upon the alleged deprivation by them of his real property and the rents and profits thereof through means of an alleged improper and illegal receivership. The respondent was named defendant because he was the receiver of the real property in question appointed by an order of the Supreme Court of the State of New York, Queens County, dated January 16, 1941, made pursuant to Section 974, subdivision 2, of the Civil Practice Act (Exhibit D, pp. 48-52*). For a clear understanding

* All references to exhibits, pages or folios from record on appeal in the Appellate Division, First Department.

of the respondent's position, it is necessary at this point to refer to the following proceedings:

By a complaint verified June 29, 1939 (fol. 302), Juanita Gelly brought an action against Anna Kalamon and Joseph Kalamon, who were alleged to be the owners of the property in question (fol. 294), and Theodore A. Dylewski, for the specific performance of a certain agreement involving such property (pp. 102-105). (For convenience, the foregoing action will be hereafter referred to as the "Gelly" action.) The petitioner appeared as the attorney for Anna Kalamon. A judgment in plaintiff's favor in said action was signed by default on November 2, 1939 (fol. 279). This judgment was resettled on December 15, 1939 (fol. 274). While the foregoing action was pending undetermined and on September 8, 1939, Anna Kalamon conveyed the property to the petitioner, her attorney in the action (fols. 98, 102, 103).

Thereafter in September 1939, Joseph Kalamon commenced an action against his wife, Anna Kalamon, and the petitioner to set aside the foregoing conveyance alleging that she conveyed the property "to her attorney, Emil J. Sonderlick, without consideration, with full knowledge on the part of both defendants of the plaintiff's rights and in further attempt to defraud the plaintiff of his interest therein, * * *" (fol. 114). The petitioner and Anna Kalamon defaulted in said action. A motion for judgment by default was granted over their opposition (fol. 251), and an interlocutory judgment was made on February 5, 1941 declaring the conveyance from Anna Kalamon to the petitioner "cancelled of record, and the said transfers hereby set aside for all purposes, * * *" (Exhibit J, pp. 66-67). Petitioner then moved to vacate said interlocutory judgment. This was granted on March 21, 1941 (fol. 252). The plaintiff, Joseph Kalamon, appealed and the Appellate Division, Second Department, reversed (fol. 255). On June 16, 1941, said appellate court denied petitioner's application for reargument of said appeal and thereafter on July 7, 1941 a final judgment in said action

was made and entered on July 11, 1941 (Exhibit K, pp. 68-71). A final judgment dismissing the petitioner's appeal therefrom was entered by the County Clerk of Queens County on October 23, 1941 (Exhibit IV, p. 106).

The respondent was not in any way involved in the foregoing proceedings. He came into the picture for the first time when he was appointed receiver in the *Gelly* action by an order dated January 16, 1941 (Exhibit D, pp. 48-52). This was only 20 days before the interlocutory judgment dated February 5, 1941 in the case of *Kalamon* against petitioner and Mrs. Kalamon to set aside the conveyance to the petitioner. This order was made on actual notice to the petitioner since he was served with the motion papers as attorney for Anna Kalamon. Petitioner submitted his own affidavit in opposition to said application (fols. 144-145), in which he asserted his ownership of the premises (fols. 97-98). He *personally* thereafter moved to vacate the order appointing the respondent receiver (fol. 162), and there admitted that the motion papers for the appointment of a receiver were addressed to him as attorney for Anna Kalamon and again asserted that she had no interest in the property since she conveyed it to him on September 8, 1939 (fol. 103). His motion was denied (Exhibit F, pp. 54-55). Petitioner appealed to the Appellate Division from such denial. Said court affirmed the determination and petitioner made no further attempts to review it (fol. 34).

Respondent continued to act as receiver in the *Gelly* action until his account was judicially settled by an order dated June 23, 1942 (Exhibit G, pp. 56-58). Petitioner on his own behalf and on behalf of Anna Kalamon opposed the application for respondent's discharge and once again raised the questions concerning his ownership. The motion was, however, granted by the aforesaid order dated June 23, 1942. Petitioner appealed to the Appellate Division, Second Department, from said order. Said appellate court affirmed and in its order of affirmance dated December 30, 1942 (Exhibit H, pp. 59-60) recited "the above

named Anna Kalamen, defendant, and Emil J. Sonderlick, *a party, in this action*, having appealed * * *" (fols. 177-178, italics supplied). Petitioner's motion in the Appellate Division for leave to appeal to the Court of Appeals from the foregoing order of affirmance was denied (fol. 321).

The complaint in the action brought by the petitioner, verified May 26, 1942, contains seven counts. The respondent is involved only in the 3rd, 5th, 6th and 7th causes of action (fols. 68-73, 78-86). The first two causes of action are solely against the plaintiff in the *Gelly* action and her attorney therein and are based upon an alleged contempt proceeding which they had prosecuted against the petitioner. The third cause of action is against Gelly, Simmons and the respondent. There, Gelly and Simmons alone are charged with having wrongfully and maliciously procured in the *Gelly* action the order appointing the respondent receiver. All that the respondent is charged with is that following his appointment and "by virtue of the said order" (fol. 71), he wrongfully etc., took possession of the premises and obtained the rents and profits thereof. The fourth cause of action is against Gelly and another attorney. The fifth cause of action is against the respondent "and the other defendants in possession of the said premises" (fol. 78). There the respondent is charged with having entered the premises on January 16, 1941 and ousted the plaintiff therefrom and obtained the rents and profits thereof. The sixth cause of action is solely against the respondent, and there again he is charged with having entered the premises on or about January 16, 1941 and carried away, without plaintiff's authority or permission or consent, the rents and profits of the property. In the seventh cause of action, the respondent alone is named and here once more he is charged with having entered the premises on January 16, 1941 and subsequent thereto, and of collecting the rents and profits therefrom.

The respondent's answer consists of a general denial and two affirmative defenses: (1) that he acted as agent

for and by order of the Supreme Court, Queens County, and his account as receiver has been settled and approved and that the petitioner's challenge of his action in taking possession of the premises under the order appointing him had been overruled by prior determinations on the merits; and (2) that the petitioner had no interest in the property as his deed thereto had been cancelled by the judgment dated February 5, 1941 in the action: Kalamon v. Anna Kalamon and petitioner (Exhibit J, p. 66).

POINT I.

The respondent took possession of the real property and collected the rents therefrom under the express direction and authority of the court and he cannot be sued for damages for doing so.

By his appointment as receiver, the respondent did not take title to the property or to the rents therefrom but merely became the agent of the court to collect and hold them subject to its order (fol. 154). The property was in *custodia legis* and so it remained until the receiver was discharged. (*Central Trust Co.* v. *Pittsburg, S. & N. R. R. Co.*, 223 N. Y. 347, 359.)

As was stated in *Fallon* v. *Egberts Woolen Mills Co.*, 56 App. Div. 585 at p. 587:

> "Where property comes into the hands of a court officer by an order or decree of the court, the court will protect its officer from actions at law. In *Parker* v. *Browning* (8 Paige 388), it is held: 'If a receiver takes possession of goods under the express directions of the court, * * * the court will assume the exclusive jurisdiction of the subject, and will not suffer the receiver to be sued at law for taking such goods.' In 2 Story's Equity Jurisprudence (§833a) it is said: 'In the next place, when such a receiver is in posses-

sion under the process or authority of the court in execution of a decree or decretal order, his possession is not to be disturbed even by an ejectment under an adverse title without the leave of the court. For his possession is deemed the possession of the court; and the court will not permit itself to be made a suitor in a court of law.'"

Davis v. *Gray*, 16 Wall. 203, 217, 21 L. Ed. 452; *Noe* v. *Gibson*, 7 Paige 513; *Walling* v. *Miller*, 108 N. Y. 173.

Had the petitioner interfered with the property in the possession of the receiver, he would have been in contempt of court. (*Lafayette Trust Company* v. *Beggs*, 213 N. Y. 280, 286.) How then can the respondent, as receiver, be held personally responsible for obeying the order of the court and possessing himself of the property and its avails as therein directed? He was not responsible for obtaining the order. According to the petitioner's own allegations in his complaint, it was the defendant Gelly and her attorney who moved for and obtained the receivership in the *Gelly* action (fol. 70). It is inconceivable that a receiver thus appointed as agent for the court should be placed in a position of peril merely by obeying the terms of the order of his appointment. It would impose upon him the duty of determining whether his appointment was legal and thereby would place him in the anomalous position of questioning the order of the court for which he was acting.*

* It is to be noted that this suit is based upon a complaint verified May 26, 1942 (fol. 90) which antedates the receiver's discharge by the order dated June 23, 1942 (fol. 166). The complaint does not allege leave of court to sue its receiver. (*Buckley* v. *Harrison*, 10 Misc. (N. Y.) 683 at pp. 688, 689.)

POINT II.

The petitioner was not deprived of his property without due process of law; he participated on the merits in the receivership proceedings and is bound by the resulting adjudications.

Petitioner's claim that a receiver could not be appointed in the *Gelly* action because he was the owner of the property and not his client and that he was not a party to the action, has been passed upon adversely in three separate adjudications prior to that sought to be reviewed here.

In each of the foregoing adjudications, the question was directly involved and none did he attempt to review by certiorari to this court. Now, more than three years after the affirmance by the Appellate Division, Second Department, in June 1941 of the order denying petitioner's motion to vacate the receivership, he attempts to review such determination in a different and collateral action.

It is respectfully submitted that he is bound by the prior adjudications. He not only disputed the merits of (1) the original application for the appointment of a receiver by stating that he and not his client was the owner of the property, but he (2) personally moved to vacate the receivership upon such ground and (3) reiterated such claim when he personally opposed the receiver's application to settle his account and to have himself discharged. A person who disputes the merits of a motion in a proceeding or action is estopped from denying the jurisdiction of the court over his person after having become an actor in the suit by his participation therein. (*Henderson* v. *Henderson*, 247 N. Y. 428; *Dyker Heights Home for Blind Children, Inc.* v. *Stolitzky, et al.*, 250 App. Div. 229.)

As was stated in *Armstrong* v. *Langmuir*, 2 Cir., 6 Fed. (2d) 369, 371, by Hand, *J.*:

> "A man may not say that he is not properly before the court, and in the same breath argue that, if he be, there is no ground to hold him. Courts have found an inconsistency in such an attitude which has led them to insist that a motion upon the merits presupposes that the party is before the court."

POINT III.

The petitioner having no right, legal or equitable, in the real property in question can in no event recover damages for the receiver's taking possession thereof and collecting the rents therefrom.

It is to be noted that the petitioner obtained a deed to the property from Anna Kalamon on September 8, 1939 prior to the interlocutory judgment made in the *Gelly* action on November 2, 1939 and that this deed was nullified by the judgment of the Supreme Court, Queens County, dated February 5, 1941, in the action prosecuted by Joseph Kalamon against the petitioner and Anna Kalamon. The receiver was appointed by an order dated January 16, 1941, or some 20 days prior to such judgment. By such judgment not only was the deed cancelled of record and the transfer set aside for all purposes, but the petitioner and Mrs. Kalamon were directed to account for all monies received by them and derived from the conveyance (fols. 199-201). This judgment nullified the deed and whatever rights the petitioner obtained by the conveyance of September 8, 1939 so that as of the time that the respondent took possession of the premises, as receiver under the order of the court, the petitioner had no interest in the property which could bottom the claims for damages asserted in his complaint. Since the judgment in the *Kalamon* case, in which he was concededly named a party defendant, is

now the law of the case, petitioner cannot possibly establish an interest in the real property in question sufficient to predicate a recovery for unlawful deprivation.

POINT IV.

The merits and equities are all with the respondent. Petitioner upon the motion for summary judgment to dismiss his complaint, failed to establish the existence of triable issues of fact as required by Rule 113 of the Rules of Civil Practice of the State of New York.

Upon a motion under the foregoing Rule, the sole question to be determined is whether there is an issue to be tried. (*Dwan* v. *Massarene*, 199 App. Div. 872, 879.) The petitioner was called upon in response to the motion for summary judgment to assemble and reveal his proofs for the purpose of showing that his complaint had merit and the facts thereof were capable of being established at the trial. (*Dodwell & Co. Inc.* v. *Silverman*, 234 App. Div. 362.) The petitioner was unsuccessful in establishing such proof and showing that there was merit to his action. Indeed, all of the proof appearing in the record presented a question of law which the New York courts have properly determined.

CONCLUSION.

The adjudication sought to be reviewed herein did not result from a construction or application of the Constitution of the United States and in any event there is no important question of law to be decided. The petition should be dismissed, with costs.

Respectfully submitted,

SAMUEL C. DUBERSTEIN,
Counsel for Respondent.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 498

EMIL J. SONDERLICK,
Plaintiff-Petitioner,

against

THOMAS H. SIMMONS, *et al.,*
Defendants,

THOMAS J. HALLINAN,
Defendant-Respondent.

PETITION FOR REHEARING.

EMIL J. SONDERLICK,
Petitioner.

by JACOB W. FRIEDMAN,
Attorney for Petitioner.

MARK SERVICE, BARCLAY 7-2180

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

EMIL J. SONDERLICK, Plaintiff-Petitioner, against THOMAS H. SIMMONS, *et al.*, Defendants, THOMAS J. HALLINAN, Defendant-Respondent.	No. 498.

PETITION FOR REHEARING.

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner respectfully prays this Court to reconsider its determination made on November 6th, 1944, which denied his petition for a writ of certiorari to the Appellate Division of the Supreme Court of the State of New York, First Department, to review a judgment of that Court affirming a summary judgment in favor of defendant-respondent Hallinan dismissing the complaint on the merits. On December 1st, 1944, the Chief Justice signed an order extending to December 26th, 1944, the time of your petitioner to file a petition for rehearing.

Your petitioner respectfully submits that there is involved in this case a serious question of constitutional law which should be passed upon by the Court, and that as a result of the adverse determinations rendered up to this point he has been deprived of the title to valuable realty without a trial, on summary motion and solely on

the basis of an adjudication in an action to which neither he nor any one with whom he was in privity was a party.

Reduced to its barest essentials, the action is one wherein your petitioner sought through the standard remedy of ejectment to regain possession of an apartment house of which he is the fee owner. Defendant Hallinan was a receiver appointed in an action to which your petitioner was not a party, which action, as has been aliter adjudicated, did not even affect the title to the realty.

Although the remedy followed by your petitioner was strictly in accordance with law, defendant Hallinan succeeded in obtaining a summary judgment on motion and petitioner was never so much as accorded a trial. The basis of this extraordinary decision was in substance two former adjudications. One of these was in an action to which your petitioner was not a party; moreover it was the action which was held not to involve the title to the realty. The other action was one in which your petitioner was a defendant, but its only possible effect dealt with the title to an undivided one-half interest in the property. Therefore, your petitioner at all relevant times was the undisputed and continuous owner of not less than a one-half interest in the property. Being wrongfully deprived of the possession, he sought to vindicate his rights by ejectment, and his case has been thrown out without a trial.

We do not propose to repeat herein the legal points heretofore argued which establish the technical correctness of your petitioner's position. That a high-handed course of legal proceedings has been invoked to take away from him his property seems abundantly clear. This Court declared in *Postal Telegraph-Cable Co.* v. *Newport*, 247 U. S. 464, that it would not sanction the extension of the doctrine of *res adjudicata* so as to give conclusive force to a judgment where the party presently named never had the opportunity to be heard, either through

himself or through one to whom he was privy. The Court then said that such a determination was violative of the Fourteenth Amendment. Your petitioner urges that an analysis of the proceedings herein will demonstrate that your petitioner has been subjected to a most egregious violation of this salutary doctrine.

Nothing that was adduced by the respondent detracted in the slightest degree from the force or efficacy of the arguments advanced.

Your petitioner is thoroughly appreciative of the likelihood that in these times the Court is confronted with numerous questions arising out of great war in which the republic is engaged. Nevertheless, the Court has unmistakably committed itself to the view that none of the Constitution's provisions "can be suspended during any of the great exigencies of government" (*Ex parte Milligan*, 4 Wall. 2). It is sorry comfort to an individual to know that the Constitution accords him divers fundamental rights, if when one of them is grossly invaded he cannot have the relief which the situation demands. Your petitioner feels that upon fuller consideration the Court will appreciate the merit of his position and decide that the case is deserving of plenary review.

Conclusion.

Petitioner respectfully urges this Court to rescind the determination heretofore made denying the writ of certiorari and that it grant such writ to the aforesaid Appellate Division of the Supreme Court to review the judgment involved.

Respectfully submitted,

JACOB W. FRIEDMAN,
Attorney for Petitioner-Appellant.